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IN THE

United States Supreme Court

October Term, 1963

No. **8**

ROBERT L. SCHLAGENHAUF, *Petitioner.*

v.

CALE J. HOLDER, United States District
Judge for the Southern District of Indiana,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ERLE A. KIGHTLINGER,
HOWARD J. DETRUDE, JR.,

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IN THE
United States Supreme Court

October Term, 1963

No. 569

ROBERT L. SCHLAGENHAUF, *Petitioner*,

v.

CALE J. HOLDER, United States District
Judge for the Southern District of Indiana,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion and the opinion of the Court of Appeals for the Seventh Circuit and the dissenting opinion has not yet been officially reported, but appears in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. In view of the subsequent order of the Respondent, are not any questions before this Court now moot?

2. Was the Petitioner, Robert L. Schlagenhauf, a party whose mental and physical condition was in controversy within the meaning of Rule 35, Federal Rules of Civil Procedure, so that the Respondent acted within his power?

3. Was there justification under the pleadings and uncontradicted, affidavit evidence justifying the exercise of the Respondent's discretion in granting the order?

4. Did the Respondent in any manner abuse his discretionary power in ordering multiple expert examinations under the facts shown here?

5. Should this Court review by certiorari a denial of the extraordinary remedy of mandamus under the facts here asserted?

FEDERAL RULES INVOLVED

Irrespective of the assertion of the Petitioner, only Rule 35(a), Federal Rules of Civil Procedure, is involved here, which Rule provides:

“(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the Court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, condition and scope of the examination and the person or persons by whom it is to be made.”

STATEMENT

The action arose out of a motor vehicle accident which occurred on July 13, 1962. On July 17, 1962 an action was commenced when Edward Markiewicz, John Anthony Markiewicz and Jennie Markiewicz filed a complaint in three paragraphs against the Greyhound Corporation, a common carrier; Robert L. Schlagenhauf, Greyhound's driver; Contract Carriers, Inc.; and Joseph L. McCorkhill, Contract Carriers' driver. On November 8, 1962 an amended complaint was filed naming National Lead Company as an additional party-defendant. The amended complaint alleges that the accident occurred on U. S. 40, which is a four-lane highway with two lanes for east bound traffic and two lanes for west bound traffic. John and Jennie Markiewicz were paying passengers on the Greyhound bus which was traveling east and which bus ran into the rear of a trailer being pulled by Contract Carriers' tractor, which was also traveling east. John and Jennie Markiewicz received personal injuries, and the complaint seeks \$1,000,000.00 compensatory damages and \$300,000.00 exemplary damages for John Markiewicz's personal injuries; \$300,000.00 compensatory damages and \$50,000.00 exemplary damages for Jennie Markiewicz's personal injuries; and \$250,000.00 compensatory damages for the loss of services of John and Jennie Markiewicz, by Edward Markiewicz, father and husband, respectively, of the two injured bus passengers.

The Defendant Greyhound filed its answer to the complaints and filed a counter-claim against Contract Carriers and Joseph L. McCorkhill, its driver; National Lead, owner of the trailer, which was being pulled by Contract Carriers; and General Motor Corporation, a third-party defendant. The counter-claim filed by Greyhound seeks to recover for the damage to the front of the bus, caused

when Mr. Schlagenhauf drove the bus into the rear of the trailer owned by National Lead and pulled by Contract Carriers.

The Defendants, Contract Carriers and Joseph L. McCorkhill, filed their answer in general denial to the amended complaint. The Defendants, Contract Carriers and Joseph L. McCorkhill, filed an answer in three paragraphs to Greyhound's counter-claim, the first paragraph in general denial; the second paragraph alleging that the negligence of the Defendant, Robert L. Schlagenhauf, in operating the bus was the proximate and contributing cause of the damage; the third paragraph alleging that the Defendant, Robert L. Schlagenhauf, was guilty of willful and wanton misconduct which proximately caused the damage to Greyhound's bus.

Contract Carriers and Joseph L. McCorkhill filed a letter with the Court pursuant to the Respondent's order, setting forth the specific allegations relied upon in defense of the counter-claim. Among these allegations were:

"4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to the Greyhound Corporation."

The Defendant, National Lead, filed its answer to the amended complaint in general denial. National Lead filed its answer to Greyhound's counter-claim, the first paragraph in general denial, and also filed a counter-claim against Greyhound and Robert L. Schlagenhauf. The counter-claim alleged, among other things, that Robert L.

Schlagenhauf was operating the bus when he knew, or should have known, that his vision was impaired.

On February 5, 1963 Contract Carriers, Joseph L. McCorkhill and National Lead filed a petition seeking to require the Defendant, Robert L. Schlagenhauf, the bus driver, to submit to a series of physical examinations in an effort to find the true reason and explanation for this accident. Said petition gave the following reasons for such examination:

- “(1) The Defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatroek, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.
- (2) The lights of the tractor-trailer unit, which was struck by the bus driven by the Defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
- (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.”

The petition further showed that multiple examinations were required by multiple experts because no one of which could examine the Defendant Schlagenhauf respective to all of the conditions which related to his driving ability. Further the petition showed the Court that without such examinations, the Defendants, Contract Carriers, Joseph L. McCorkhill and National Lead, would be without means to present evidence on this issue and would be unable to properly present their defense.

The District Court on February 21, 1962 ordered the Defendant, Mr. Schlagenhauf, to submit to physical and

mental examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists.

On March 14, 1963 Contract Carriers, Joseph L. McCorkhill and National Lead filed a supplemental petition for a physical examination of Mr. Schlagenhauf. The supplemental petition of Contract Carriers and Joseph L. McCorkhill alleges that such examinations are necessary as the physical and mental condition of Mr. Schlagenhauf is in issue by virtue of the answer of general denial to Greyhound's cross-complaint.

National Lead filed a supplemental petition for physical and mental examinations of Mr. Schlagenhauf, alleging that the physical and mental condition of Mr. Schlagenhauf is in issue by the cross-complaint filed by National Lead against Greyhound and Robert Schlagenhauf.

The District Court issued an order on March 15, 1963 granting Contract Carriers', Joseph L. McCorkhill's and National Lead's prayer for physical and mental examinations of Mr. Schlagenhauf.

The Petitioner then applied to the Court of Appeals for the Seventh Circuit for a Writ of Mandamus requiring the District Court to vacate its order of February 21, 1963 and the second order of March 15, 1963.

The Court of Appeals denied the petition.

Subsequent to the decision of the Court of Appeals, the Respondent vacated his order which was the subject of that Court's decision, and ordered the Petitioner to submit to an examination in each of four areas of medical specialties.

ARGUMENT

I

The Questions Presented by the Petition for Certiorari are Moot

The District Court entered an order which was in the normal course the subject of review by the Circuit Court of Appeals. The Circuit Court of Appeals rendered its decision refusing to interfere with the order. While all stays were dissolved and before any petition was on file here, the District Court vacated its order which had been the subject of review by the Circuit Court of Appeals and entered a new order covering the same subject matter, ordering the Petitioner to submit in all to physical examinations by four specialists. This order which supplants all previous orders was never reviewed by the Circuit Court of Appeals. All but one question, that of the degree of multiple examinations, admittedly remain if in fact there are any questions of substance before this Court. But technically the order of the District Court which now exists is not the same order as is now being sought to be reviewed in this Court. On this theory, the controversy is clearly moot in this Court.

II

The Decision Below is Clearly Correct

The Respondent in interpreting and applying Rule 35 did so in light of its historical development and the overall philosophy behind discovery procedures under the rules as they pertain to physical and mental examinations of parties.

The Court of Appeals' opinion is bottomed upon the obvious premise, in light of this Court's previous pronouncements, that there are no constitutional prohibitions in this area.

Irrespective of the language in *Union Pacific Railway v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734, later repudiated by implication, and relied upon heavily by the Petitioner, the case holds only to the proposition that there was no inherent power in the Federal Court to order a physical or mental examination of a party; and without statutory authority, the Federal Court could not then order such examination.

This holding was narrowed in *Camden & Suburban Ry. v. Stetson* (1900), 177 U. S. 172, 20 S. Ct. 614, 44 L. Ed. 721, when this Court held, there being present state statutory authority, that the Federal Court sitting therein could likewise enter an order for a physical examination of a party.

When Rule 35 was adopted, the gap between *Botsford* and *Stetson* was filled and the Federal Courts now had direct authority for ordering such examinations. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

There now being no constitutional inhibitions to an order compelling a party to submit to a physical examination, the only question that can remain is whether Rule 35 is broad enough to require a party-defendant to submit to such an examination under the showing here.

Wadlow v. Humbert (D.C.W.D. Mo. 1939), 27 F. Supp. 210, 1 F. R. Serv. 35a.21, Case 1, one of the early cases decided under this rule, narrowly interpreted its provi-

sion and held that it applied only to personal injury cases, and when the physical and mental condition was "immediately and directly" in controversy.

This narrow construction was seriously criticized by text writers and disapproved in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2, wherein the Court in order to achieve justice applied the rule in an action by a wife for maintenance of a child where there was a counter-claim based upon adultery and a denial of paternity, the Court holding that the child was a "party" for the purpose of the physical examination rule. It was further applied successfully in a case involving a war risk policy, *Countee v. U. S.* (C.C.A. 7th 1940), 112 F. (2d) 447, 3 F. R. Serv. 35a.5, Case 1, and in many instances familiarly known as the Chinese naturalization cases of which *Lue Chow Ken v. Brownell* (C.C.A. (2d) 1955), 220 F. (2d) 187, 21 F. R. Serv. 35a. 21, Case 1, is representative. No one can surmise in how many other types of cases the remedy under this rule has been usefully employed to achieve just results in the search for truth.

Rule 35 was adopted to enable parties to law suits to ascertain the true facts concerning the mental or physical condition of any other party if in controversy. The policy of the rule is to compel full disclosure of the true facts concerning any party's physical or mental condition, so that nothing is hidden from the fact finder. The language of the rule is clear and unambiguous. It does not limit its application, as the Petitioner would suggest, to a "party-plaintiff," but the rule provides for a remedy relating to a "party." The rule does not require the physical or mental condition to be specifically "in issue," but it suffices if it is "in controversy."

Essentially, Petitioner's argument in the Court below, and here, inevitably comes to the position that he is not a party, his mental or physical condition is not in controversy, and good cause was not shown.

That Robert L. Schlagenhauf is a party is unquestioned. He is a party-defendant in the principal action. He is a party-defendant to the cross-complaint filed by National Lead. He drove the Greyhound bus into the rear of a moving, lighted tractor-trailer generating all this litigation. To argue that he is not a party ignores the obvious.

Is his physical and mental condition in controversy?

The Petitioner is attempting to fragmentize the law suit. The Petition emphasizes "pleading allegations." The trial court, as well as the Court of Appeals, recognized that in fact there were pleading allegations, or the equivalent thereof that places the Petitioner's physical and mental condition actually in issue. It was alleged specifically in the cross-complaint of National Lead. Further in a letter notice required by the Respondent, it was specifically alleged in the defense of Contract Carriers, Inc. and Joseph L. McCorkhill to the complaint. The Respondent in his answer to the Petition for Mandamus insists the physical and mental condition of the Petitioner was of necessity in issue; therefore, in controversy under the answer of the co-defendants to the plaintiff's complaint.

The co-defendant always has available the defense of showing that the other co-defendant or co-defendants are solely negligent, and their acts are solely the proximate cause of the accident and injuries to the plaintiff even though not specifically pleaded.

Irrespective of the Petitioner complaining of the multiple examinations, the subsequent order to which refer :

ence has been made in Point I of the Argument, and which is the subject of the additional record brought before this Court by the Respondent; the number of examinations has been reduced more than one-half and involves examinations in recognized specialties having relevance to the possible physical and mental aberrations which could have been present and affected Petitioner's ability to see or appreciate dangers. In today's complex society, it certainly is not an abuse of discretion to order examinations in various areas of medical specialties in the search for the true facts. That the Court is not limited to ordering one examination is clearly stated in 2A, Barron and Holtzoff, **FEDERAL PRACTICE & PROCEDURES**, Sec. 822, P. 483 (1961):

"* * * Such a limitation is wholly inconsistent with the realities of modern medical practice, where specialists from various branches of medicine are required. There is nothing in the rule to prevent the Court from ordering examinations by all of them."

The jurisdiction of this Court should not be invoked to review an order involving the number of physical examinations ordered which concededly is in areas of the trial court's discretion.

It being clear that the Petitioner's physical and mental condition was in controversy, this leaves only the question of whether good cause was shown to activate the remedy that Rule 35 provides.

The Court was presented with a petition which showed:

- (1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

- (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
- (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.
- (4) Without examination by a competent qualified physician in each of the fields as listed, petitioner's co-defendants would be without means to present evidence on this issue.
- (5) Without examination by a competent qualified physician in each of the fields as listed, petitioner's co-defendants would be unable to properly present their defense.

This petition was supported by an affidavit which presented these facts to the trial court.

The petition for medical examination of Defendant Schlagenhauf laid in the Court for sixteen days, and at no time did he present any counter-affidavits or present any fact contrary to those before the Respondent.

Considering the fact that this action arose out of a collision wherein Defendant Schlagenhauf drove a bus into the rear of a tractor-trailer which was visible to both himself and another witness; considering the fact that this was the second such accident on the part of Mr. Schlagenhauf; and considering the fact that this was the only way Contract Carriers, Joseph L. McCorkhill and National Lead had to obtain evidence upon the issue of Mr. Schlagenhauf's mental and physical condition and was the only way in which they could prepare their defense, good cause was surely shown.

The Petitioner introduces completely extraneous considerations by reference to a distinction between a party who is in the case voluntarily or involuntarily. If he is a party, we contend that suffices to invoke the rule. The search for truth and just results, which is the real mandate of the Federal Rules, hardly depends upon such irrelevancies as to whether or not the Petitioner was required to appear to the plaintiff's action by summons or whether he, himself, commenced the action. If he is a party and if his physical and mental condition is in controversy, he comes within the ambient of the rule.

III.

The Petitioner has Failed to Show Sufficient Facts to Warrant the Extraordinary Writ of Mandamus

Rules of Federal Procedure providing for discovery either have constitutional infirmities or they do not. This Court has held that they do not. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479. To begin at this late date to construe the clear and unambiguous language of Rule 35 so as to limit its application only to a party-plaintiff would be a step backwards. If the rule was within the power of this Court to approve in the first instance, then surely under its clear and unambiguous language it was within the power of the Respondent to apply.

In any event, if the power to order a party-defendant to submit to a physical examination under Rule 35 is present, this matter then resolves itself to the question of the trial courts exercise of discretion. This Court has uniformly announced its intention to avoid interfering with the discretionary powers of trial courts.

In *Ex Parte Fahey* (1947), 332 U. S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041, this Court held:

"Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes."

In *Fisher v. Delchart* (C.C.A., 8th, 1959), 250 F. (2d) 265, the Court held:

"We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion entrusted to him by law."

In *Belships Co. Ltd., Skibs A/S v. The Republic of France* (C.C.A. (2d) 1950), 184 F. (2d) 119, the Court held:

"While we have authority to issue one of the extraordinary writs prayed for in aid of our appellate jurisdiction, we have been admonished that this should be done only when necessary in extraordinary cases, and not as a means of interlocutory appeal."

The only showing by Petitioner for the extraordinary remedy of mandamus is that of personal inconvenience. In the last analysis, the Petitioner is really seeking an interlocutory appeal here, raising only the question of whether or not Respondent abused his discretion. The Petitioner has wholly failed to show wherein he will be ir-

reparably harmed by complying with Respondent's order. To paraphrase the language of the Court of Appeals in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case '2; if the examination shows nothing was wrong with Petitioner, he certainly was not harmed; and if the examination shows his physical or mental condition caused this tragic accident, a miscarriage of justice has been averted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERLE A. KIGHTLINGER,

HOWARD J. DETRUDE, JR.,

ARIBERT L. YOUNG,

626 Fidelity Building,

111 Monument Circle,

Indianapolis, Indiana,

KEITH C. REESE,

156 East Market Street,

Indianapolis, Indiana,

Counsel for Respondent.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a
minor by his father and next friend,
EDWARD MARKIEWICZ and
JENNIE MARKIEWICZ, in their own
right,

Plaintiffs.

v.

No. IP 62-C-285

THE GREYHOUND CORPORATION
ROBERT L. SCHLAGENHAUF,
JOSEPH L. McCORKHILL, and
CONTRACT CARRIERS, INC.,

Defendants.

and
NATIONAL LEAD COMPANY,

Third Party Defendant.

**PETITION TO AMEND COURT ORDER AND TO
ORDER DEFENDANT, ROBERT L. SCHLAGEN-
HAUF, EXAMINED PHYSICALLY**

The defendant, National Lead Company, prays that this Court modify its order heretofore entered on March 15, 1963 ordering the defendant, Robert L. Schlagenhauf, examined by nine (9) physicians, said previous order of the Court being in the words and figures as follows:

(H.I.)

the defendant, National Lead Company, prays that the Court modify this order to require said defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians:

Dr. L. Leo Loughlin, M.D.

Dr. A. Ebner Blatt, M.D.

Dr. Karl L. Manders, M.D.

Dr. Jack I. Taube, M.D.

This Court has heretofore ordered that counsel for defendant, National Lead Company, and counsel for defendant, Robert L. Schlagenhauf, and the Greyhound Corporation, to agree as to dates and times for said physical examinations; it was impossible to agree on specific dates and the defendant, National Lead Company further prays that the Court order said defendant, Robert L. Schlagenhauf to be examined by the four (4) said doctors on the dates and times as follows:

Dr. L. Leo Loughlin, M.D.

Dr. A. Ebner Blatt

Psychiatrist

Internist

10:00 A.M. 9/24/63

3:30 P.M. 9/20/63

Dr. Karl L. Manders, M.D.

Dr. Jack I. Taube

Neurologist

Ophthalmologist

8:30 A.M. 10/7/63

11:00 A.M. 10/10/63

The Petitioner further shows the Court that certain appointments have been made and that on September 6, 1963, the attorneys for Robert L. Schlagenhauf were advised of said times and dates; per copy of a letter which is attached hereto, and marked Exhibit "A"; but that attorneys for Schlagenhauf have advised that said appointments cannot be kept by Schlagenhauf.

WHEREFORE, Petitioner prays that this petition, and all things herein contained be sustained.

ROCAP, ROCAP, REESE & ROBB,

By KEITH C. REESE,
Attorneys for Defendant,
National Lead Company.

156 E. Market Street,
Indianapolis, Indiana,
MElrose 8-7547.

EXHIBIT "A"

September 6, 1963

Smith & Yarling
Attorneys at Law
1313 First Federal Building
13 N. Pennsylvania Street
Indianapolis, Indiana

Re: John Anthony Markiewicz, bnf
Edward Markiewicz, et al

v. The Greyhound Corporation
Robert L. Schlagenhauf
Joseph L. McCorkhill
Contract Carriers, Inc. and
National Lead Company
Cause No. IP 62-C-285

Attention: Mr. Richard Yarling

Dear Dick:

Confirming our several conferences concerning physical examination of Robert L. Schlagenhauf, we wish to ad-

wise that we have made the following appointments with the following doctors:

Dr. L. Leo Loughlin, M.D.
psychiatrist
10:00 A.M. 9/24/63

Dr. A. Ebner Blatt
Internist
3:30 P.M. - 9/20/63

Dr. Karl L. Manders, M.D.
neurologist
8:30 A.M. 10/7/63

Dr. Jack I. Taube
OPHTHALMOLOGIST
11:00 A.M. - 10/10/63

These doctors have advised that if the reserved time is not used by Mr. Schlagenhauf, and no other patient uses the time, that they will charge for said allotted time. We wish to advise you that if Mr. Schlagenhauf cannot keep these appointments, and there is any charge we will expect Mr. Schlagenhauf to pay same.

We are attempting to arrange other physical examinations as ordered by the Court, and will advise you when this has been accomplished.

Yours very truly,

ROCAP, ROCAP, REESE & ROBB,
KEITH C. REESE,

KCR:as
cc Mr. A. L. Young
Armstrong, Gause, Hudson &
Kightlinger, attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of said Petition has been sent this 14 day of September, 1963 to Smith & Yarling, 13 North Pennsylvania Street, Indianapolis, Indiana, Townsend and Townsend, Indiana Building, Indianapolis, Indiana, Edmund Pawelec, Western Saving Fund Building,

Philadelphia, Pennsylvania, Locke, Reynolds, Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, Sheldon Breskow, Lemcke Building, Indianapolis, Indiana, Lewis, Weiland, Payne and Carvey, Monument Circle, Indianapolis, Indiana by posting it in the United States Mail.

ROCAP, ROCAP, REESE & ROBB,
By KEITH C. REESE

ROCAP, ROCAP, REESE & ROBB
156 East Market Street
Indianapolis, Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a
minor by his father and next friend,
EDWARD MARKIEWICZ and
JENNIE MARKIEWICZ, in their
own right,

Plaintiff.

v.

No. IP 62-C-285

THE GREYHOUND CORPORATION
ROBERT L. SCHLAGENHAUF,
JOSEPH L. McCORKHILL, and
CONTRACT CARRIERS, INC.,
NATIONAL LEAD COMPANY,

Defendants.

**OBJECTIONS AND BRIEF OF DEFENDANT
ROBERT L. SCHLAGENHAUF IN OPPOSITION
TO PETITION TO ORDER PHYSICAL AND
MENTAL EXAMINATIONS**

The defendant Robert L. Schlagenhauf respectfully submits the following brief in opposition to the petition filed by defendant National Lead Company herein on September 16, 1963 to order this defendant to submit to physical and mental examinations by the four physicians named in the said petition, to-wit: Dr. L. Leo Loughlin, psychiatrist; Dr. Karl L. Manders, neurologist; Dr. A. Ebner Blatt, internist; and Dr. Jack I. Taube, ophthalmologist:

This defendant has heretofore filed his brief in opposition to the original petitions of defendant National Lead Company and defendant Contract Carriers, Inc. for such examinations, asserting that the physical and mental condition of the defendant Robert L. Schlagenhauf is not "in controversy" herein in the sense that these words are used in Rule 35 of the Federal Rules of Civil Procedure; that good cause has not been shown for the multiple examinations prayed for by the cross-defendant; and that the ordering of such examinations, including mental examination, of a defendant driver is wholly unprecedented and beyond the authority extended by Rule 35. A review of the points and authorities set forth in the said original brief is respectfully requested. In addition to the quotation from *Union Pacific R. Co. v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 previously set forth that:

251 "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of

his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law * * *"

the attention of the Court is respectfully called to the quotation respecting the requirement of the showing of good cause under Rule 35 as set forth in *Guilford National Bank of Greensboro v. Southern Ry. Co.* (4th Cir. 1962), 297 F. (2d) 921:

924 "There appear to be adequate policy reasons for imposing the good cause requirement of Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."

In opposition to the requirement of any examinations at all, much less four examinations including mental examination, this defendant asserts again that good cause has not been shown for such examinations, and no such cause is alleged or supplemented in the petition filed on September 16, 1963 by defendant National Lead Company. It is further respectfully pointed out to the Court that no hearing has been held to inquire into the existence of good cause, if any, and there has been no showing by the defendant National Lead Company that no adequate alternate method exists of making proof of this defendant's physical and mental condition or that examinations at this time will shed light upon this defendant's condition at the time of the accident more than a year ago.

In opposition to the particular examinations and the times thereof, objection is further made that in any event the defendant Robert L. Schlagenhauf could not appear for the examination scheduled by Dr. Leo Loughlin for Sep-

tember 24, 1963 for the reason that the presence of this defendant is required in the City of Philadelphia, State of Pennsylvania, during all of the week beginning September 23, 1963 to participate actively in the defense of actions entitled Norma Pauline, Joseph Pauline, Frederick Pauline, and Catherine Pauline v. The Greyhound Corporation which are pending in the Court of Common Pleas in the said City and State, the trial of which commences on the 23d day of September, 1963 and which arise out of the same collision involved herein; and additional objection is made to examination by Dr. Karl L. Manders, a neurologist, for the reason that the said Dr. Manders has testified and is to testify for plaintiffs in many cases being defended by this defendant's attorneys and is verily believed to be prejudiced toward the said attorneys and therefore toward this defendant to the extent that this defendant could not receive a fair and impartial examination and report thereof by the said Dr. Manders.

The defendant Robert L. Schlagenhauf respectfully prays that the petition of defendant National Lead Company be denied and that any and all prior orders for the physical and mental examination of this defendant be set aside.

Respectfully submitted,

SMITH & YARLING,

By RICHARD W. YARLING,
1113 First Federal Bldg.,
Indianapolis, Indiana

Attorneys for Defendant

Robert L. Schlagenhauf.

VERIFICATION

Richard W. Yarling, being first duly sworn, deposes and says that he has read the foregoing Objections and Brief and that the statements of fact contained therein are true.

RICHARD W. YARLING

Richard W. Yarling

STATE OF INDIANA }
COUNTY OF MARION } SS:

Subscribed and sworn to before me, the undersigned, a Notary Public, in and for said county and state this 18th day of September, 1963.

DONALD K. TENNELL

Notary Public

My commission expires 6-26-65

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the defendant Robert L. Schlagenhauf, certifies that copies of the foregoing Brief were forwarded by first class U. S. Mail, postage prepaid, on the 18th day of September, 1963, to Rocap, Rocap, Reese & Robb, 156 E. Market Street, Indianapolis, Indiana, attorneys for defendant National Lead Company; Townsend & Townsend, 403 Indiana Building, Indianapolis, Indiana, attorneys for plaintiffs; Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, attorneys for defendant Contract Carriers, Inc. and Joseph L. McCorkhill; and to Locke, Reynolds,

Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, attorneys for cross-defendant General Motors Corporation.

RICHARD W. YARLING
Attorney.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a
minor by his father and next friend,
EDWARD MARKIEWICZ and
JENNIE MARKIEWICZ, in their
own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION
ROBERT L. SCHLAGENHAUF,
JOSEPH L. McCORKHILL, and
CONTRACT CARRIERS, INC.,

Defendants.

and

NATIONAL LEAD COMPANY,
Third Party Defendant.

No. IP 62-C-285

ORDER

The Defendant, National Lead Company, has filed its Petition To Amend Court Order and To Order Defendant, Robert L. Schlagenhauf, Examined Physically, which petition is in the words and figures as follows:

(H.I.)

The Court hereby grants said petition and vacates its order requiring Robert L. Schlagenhauf to be examined by

nine (9) physicians, said order being dated March 15, 1963 and the Court having read and examined said petition and being duly informed and advised in the premises now grants said petition.

The Court now orders the defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians on the dates and times indicated:

Dr. L. Leo Loughlin, M. D.
10:00 A. M. 9/24/63

Dr. A. Ebner Blatt
3:30 P.M. 9/20/63

Dr. Karl L. Manders, M.D.
8:30 A.M. 10/7/63

Dr. Jack I. Tabue
11:00 A.M. 10/10/63

CALE J. HOLDER
Judge, United States District
Court

DATED this Sept. 18, 1963
day of September, 1963

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF,
Petitioner.

v.

CALE J. HOLDER, United States
District Judge for the Southern
District of Indiana,

Stay Order

Respondent.

Upon consideration of the emergency motion for stay of proceedings and/or stay of enforcement of any and all orders of the respondent requiring the physical and mental examination of petitioner, as filed by the petitioner herein, to enable said petitioner to seek review of this Court's decision of July 23, 1963, by way of petition for writ of certiorari to the Supreme Court of the United States, and it appearing that good cause therefor exists, it is

ORDERED, that the proceedings in consolidated causes No. IP 62-C-285 and IP 62-C-308 as docketed in the United States District Court for the Southern District of Indiana shall be and hereby are stayed, including the enforcement of any and all orders of said respondent requiring petitioner to submit to physical and mental examination pending the filing and disposition of petitioner's petition for writ of certiorari to the Supreme Court of the United States for review of this Court's decision of July 23, 1963 herein.

DATED September 24, 1963.

/s/ LUTHER M. SWYGERT
Circuit Judge

A True Copy:

Teste:

KENNETH J. CARRICK

Clerk of the United States Court of
Appeals for the Seventh Circuit.

A-13

IN THE
SUPREME COURT OF THE UNITED STATES

No. 569

ROBERT L. SCHLAGENHAUF,

Petitioner.

v.

CALE J. HOLDER, United States

Judge for the Southern

District of Indiana,

Respondent.

ENTRY

Cale J. Holder, United States District Judge for the Southern District of Indiana, Respondent, hereby directs the Clerk of the United States District Court for the Southern District of Indiana to properly certify to the Supreme Court of the United States as the following portions of the record involving pertinent matters occurring in his court subsequent to the decision of the United States Court of Appeals for the Seventh Circuit and prior to the filing of the petition for a writ of certiorari herein, which proceedings occurred in a cause entitled and numbered: "John Anthony Markiewicz, a minor by his father and next friend, Edward Markiewicz and Jennie Markiewicz, in their own right, Plaintiff, v. The Greyhound Corporation, Robert L. Schlagenhauf, Joseph L. McCorkhill, and Contract Carriers, Inc., Defendants, and National Lead Company, Third Party Defendant," No. IP 62-C-285, to-wit:

Petition to Amend Court Order and to Order Defendant, Robert L. Schlagenhauf, Examined Physically, filed September 16, 1963;

Objections and Brief of Defendant Robert L. Schlagenhauf in Opposition to Petition to Order Physical and Mental Examinations, filed September 18, 1963;

Order entered by the Court ordering the physical examinations, dated September 18, 1963;

Order of the United States Court of Appeals for the Seventh Circuit entered September 24, 1963, staying proceedings.

Said portions of the record, after having been so certified, shall be delivered to the attorneys of record for the Respondent and shall be filed by them in the Supreme Court of the United States as its rules provide, a certified copy of this Entry to be attached.

DATED this 25 day of October, 1963.

CALE J. HOLDER

Judge, United States District
Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a
minor by his father and next friend,
EDWARD MARKIEWICZ and
JENNIE MARKIEWICZ, in their
own right,

v.

THE GREYHOUND CORPORATION
ROBERT L. SCHLAGENHAUF,
JOSEPH L. McCORKHILL, and
CONTRACT CARRIERS, INC.,
and
NATIONAL LEAD COMPANY,

Third Party Defendant.

No. IP 62-C-285

CLERK'S CERTIFICATE

I, Robert G. Newbold, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the foregoing is a true transcript of copies of proceedings and pleadings had and filed in the above cause, as listed and designated in the Index of this transcript.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Court at Indianapolis, Indiana, this 25 day of October, 1963.

ROBERT G. NEWBOLD, *Clerk*
United States District Court
Southern District of Indiana

By: ARTHUR J. BECK
Deputy Clerk